Supreme Court, U.S.
FILED
APR 26 2000
CLERK

(3)

No. 99-1536

IN THE

Supreme Court of the United States

D.H.L. ASSOCIATES, INC.,

Petitioner,

v.

JOHN O'GORMAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

*WILLIAM C. NEWMAN
THOMAS J. MCCORMICK
LESSER, NEWMAN, SOUWEINE
& NASSER
39 Main Street
Northampton, Massachusetts 01060
(413) 584-7331

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. A Decision in Petitioner's Favor on the State Law Issues Would Resolve the Entire Case, Including Claims for Attorneys' Fees and Costs, Without the Need to Address the Federal Constitutional Questions. 2

II. The State Constitutional Questions Are Either Novel or Involve An Unsettled Area of Law, and Therefore, Are Appropriate Issues for Certification, Otherwise Both the District Court and the Court of Appeals Would Have Decided Them. 3

III. The Court of Appeals Applied the Wrong Standard to Determine Whether the Federal Constitutional Issues Should Be Decided While Leaving Open for Adjudication by the State Courts the State Issues Which May Be Dispositive and Would Render the Federal Opinion Advisory. 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES:

A.F.M., Ltd. v. City of Medford,
428 Mass. 1020, 704 N.E.2d 184
(1999) 4n

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 5

Clay v. Sun Insurance Office,
363 U.S. 207 (1960) 3

Crane v. Commissioner of Public Welfare,
400 Mass. 46, 507 N.E.2d 751
(1987) 2

Johnson v. Commissioner of Public Welfare, 419 Mass. 185, 643 N.E.2d
444 (1994) 2

Maher v. Gagne, 448 U.S. 122 (1980) 2

Michigan v. Long, 463 U.S. 1031 (1983) 1, 4, 5

T & D Video v. City of Revere,
423 Mass. 577, 670 N.E.2d 162
(1996) 4n

CONSTITUTIONAL PROVISIONS AND CODES:

United States Constitution

First Amendment 3

Massachusetts Declaration of Rights

Article 16 3

United States Code

42 U.S.C. § 1983 2

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

In this Reply, the petitioner responds to three arguments made by the respondents in their Brief in Opposition ("Opposition") that are claimed to support the decision of the federal courts to address the federal constitutional claims and withhold decision on the potentially dispositive state claims that may render the federal decision advisory:

(1) that a claim for attorneys' fees requires a federal court to decide federal constitutional questions on which the court otherwise would abstain, Opposition, pp. 15-16;

(2) that it was proper for the federal courts to decline to certify the state issues because the questions were settled and not novel, Opposition, pp. 6-10; and

(3) that the jurisdictional standard in *Michigan* v. *Long* governs certification. Opposition, pp. 13-15.

I. A Decision in Petitioner's Favor on the State Law Issues Would Resolve the Entire Case, Including Claims for Attorneys' Fees and Costs, Without the Need to Address the Federal Constitutional Questions.

The respondents contend that certifying the state constitutional questions to the Massachusetts Supreme Judicial Court would "not obviate the need for adjudication of the federal questions . . . [because] DHL would have to succeed in its federal claims to obtain an award of attorneys [*sic*] fees and costs. . . ." Opposition, p.15. This contention simply is wrong as a matter of law.

When a case involves both state and 42 U.S.C. § 1983 claims, a plaintiff is entitled to an award of attorneys' fees under § 1983 when the case is decided solely on the basis of a state claim as long as the federal claims are substantial and arise out of a "common nucleus of operative fact." *Maher* v. *Gagne*, 448 U.S. 122, 132 n.15 (1980)(citations omitted). *Johnson* v. *Commissioner of Public Welfare*, 419 Mass. 185, 187, 643 N.E.2d 444 (1994)(same); *Crane* v. *Commissioner of Public Welfare*, 400 Mass. 46, 49-50, 507 N.E.2d 751 (1987)(same).[1]

---

[1] Like certification, the *Maher* rule furthers the goal of vindicating rights "without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." *Maher*, 448 U.S. at 133 (citations omitted).

Here, the federal courts and the parties all agree that the state and federal constitutional claims arise from the same operative facts and that the latter claims are substantial. Accordingly, if the state constitutional law questions were reached and resolved in the petitioner's favor, the entire case — including the attorneys' fees issue — would be resolved without the need for any court to address the federal constitutional questions.

II. The State Constitutional Questions Are Either Novel or Involve An Unsettled Area of Law, and Therefore, Are Appropriate Issues for Certification, Otherwise Both the District Court and the Court of Appeals Would Have Decided Them.

After reaching the First Amendment issues, the district court remanded the state constitutional questions to the state courts for adjudication. The respondents did not contest this order, and the Court of Appeals let it stand.

Accordingly, the respondents' claim that the state issues are neither novel nor unsettled is clearly frivolous. If the issues were clear and settled, the lower federal courts would have decided them. *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 209-10 (1960).

Indeed, District Court Judge Keeton explained during the trial of this case that he was reluctant to decide the case on state constitutional grounds precisely because Massachusetts' article 16 juris-

prudence in this area of adult entertainment is unsettled. Petition for a Writ of Certiorari ("Petition"), pp. 8-9, Appendix, p. 75a.[2]

III. The Court of Appeals Applied the Wrong Standard to Determine Whether the Federal Constitutional Issues Should Be Decided While Leaving Open for Adjudication by the State Courts the State Issues Which May Be Dispositive and Would Render the Federal Opinion Advisory.

In its decision, the Court of Appeals stated without citation that "[b]ecause we are not convinced that state law provides an independent and sufficient basis for deciding the case," the district court did not err by declining to certify the state law questions. Petition Appendix at 25a. The phrase "independent and sufficient basis" arguably conjures up the jurisdictional standard of *Michigan* v. *Long*, 463 U.S. 1031 (1983), where this Court articulated the test for determining whether the federal courts should exercise jurisdiction over a federal question when a state's

---

[2] The respondents also mention timeliness. Opposition, pp. 2, 16-17. The remand and certification motions were decided on the merits. Timeliness was not a consideration. In any event, the motions were timely, prompted by the decisions of the Supreme Judicial Court in *T & D Video* v. *City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996) and *A.F.M., Ltd.* v. *City of Medford*, 428 Mass. 1020, 704 N.E.2d 184 (1999), which were decided two and five years, respectively, after this case was filed by the petitioner in state court and removed to federal court by the respondents.

highest court has decided the case arguably under both state and federal law grounds. *Long* held that a federal court may not reach the federal question in such circumstances if the state court's state law decision is based on adequate and independent state grounds appearing plainly in its written decision.

In their brief, the respondents faulted the petitioner for failing to mention the *Long* standard in its Petition. Opposition, pp. 13-14. *Long's* holding, however, has no application to the present case. The tests for certification are the related threshold questions whether the state law issues are unsettled and whether resolution of the state law questions *may* dispose of the case, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78-79 (1997) — not whether the state law provides an adequate and independent basis for deciding the case. No basis for certification exists if the state law is reasonably clear. The federal court simply would, as all federal courts routinely do, decide the state claim. By applying the *Long* test to the certification question, the Court of Appeals erred.

CONCLUSION.

For the above reasons, and for the reasons stated in its Petition, the petitioner respectfully requests that this Court grant certiorari to resolve the important question of when federal courts should decide federal constitutional issues, but

leave unresolved for remand the potentially dispositive state law claims.

Respectfully submitted,

The Petitioner,
by its attorneys,

*WILLIAM C. NEWMAN
THOMAS J. McCORMICK
LESSER, NEWMAN, SOUWEINE
& NASSER
39 Main Street
Northampton, Massachusetts 01060
(413) 584-7331

**Counsel of Record*